MOTION FILED

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No. 04-1216

IN THE

SUPREME COURT OF THE UNITED STATES

SAGE HOSPITALITY RESOURCES, LLC,
Petitioner,
v.
HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES UNION, LOCAL 57,
Respondent.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Third Circuit

MOTION FOR LEAVE TO FILE JOINT BRIEF OF AMICI CURIAE IN SUPPORT OF THE PETITION AND BRIEF OF AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES, ASSOCIATED BUILDERS AND CONTRACTORS, INC., AND THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF THE PETITION

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MOTION FOR LEAVE TO FILE JOINT BRIEF OF AMICI CURIAE

The Chamber of Commerce of the United States, Associated Builders and Contractors, Inc., and the Society for Human Resource Management (the "*Amici*") hereby move pursuant to Rule 37.2(b) for leave to file a joint Brief of *Amici Curiae* in support of the Petition in the above captioned matter. In accordance with the Court's Rule, the proposed *amicus* brief is attached to this Motion and made part of the same document.

Prior to filing this Motion, the *Amici* requested consent from the parties for the filing of the joint amicus brief. The Petitioner consented to the filing of the proposed amicus brief, but the Respondent withheld consent.

As grounds for the Motion, the *Amici* assert as follows:

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents an underlying membership of more than three million businesses, state and local chambers of commerce, and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber advocates the interests of the national business community in courts across the nation by filing *amicus curiae* briefs in cases involving issues of national concern to American business.

Associated Builders and Contractors, Inc. (ABC) is a national trade association of more than 23,000 construction contractors and related firms. ABC's members share the view that work should be awarded and performed on the basis of merit, regardless of labor affiliation. ABC members include both non-union and unionized firms, many of whom perform

work on government-sponsored economic development projects.

The Society for Human Resource Management ("SHRM") is the largest human resource management association in the world. Founded in 1948, SHRM represents more than 190,000 individual members and serves the needs of HR professionals by providing essential and comprehensive resources and by ensuring that HR is recognized as an essential partner in developing and executing organizational strategy.

The *Amici* are jointly filing this brief in support of the Petition in order to bring to this Court's attention the serious threat to the balance of interests under federal labor law presented by the decision of the Third Circuit. The Third Circuit failed to appreciate the potentially staggering impact of its decision on private employer labor relations throughout the United States, due to the pervasive nature of government-sponsored economic development programs all over the country, similar in scope and effect to the Pittsburgh City Ordinance. The *Amici's* brief will assist the Court in reviewing the issues raised by the Petition, because the *Amici* have broader familiarity than either of the parties with tax incentive financing (TIF) and other widespread forms of economic development programs utilized by state and local governments everywhere in the United States.

The City Ordinance upheld below broadly imposes collective bargaining obligations on private employers, in direct contravention of the NLRA. As a result of the Third Circuit's decision, private businesses nationwide will be in jeopardy of losing their rights to freedom of contract previously protected by federal labor law. By expanding this Court's "market participant" doctrine beyond the narrow confines of the construction industry and into the inherently regulatory practice of tax increment financing, the Third

Circuit's decision threatens interference with the protected rights of countless private employers and their employees.

Wherefore, the Motion for leave to file the joint brief of *Amici Curiae* in support of the Petition should be granted.

Respectfully submitted,

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INTERESTS OF THE AMICI [1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents an underlying membership of more than three million businesses, state and local chambers of commerce, and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber advocates the interests of the national business community in courts across the nation by filing *amicus curiae* briefs in cases involving issues of national concern to American business.

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[1] Pursuant to Supreme Court Rule 37.6, the Amici state that this brief was not prepared, written or produced by any person or entity other than the Amici or their counsel.

The *Amici* are jointly filing this brief in support of the Petition in order to bring to this Court's attention the serious threat to the balance of interests under federal labor law presented by the decision of the Third Circuit. The Third Circuit failed to appreciate the potentially staggering impact of its decision on private employer labor relations throughout the United States, due to the pervasive nature of government-sponsored economic development programs all over the country, similar in scope and effect to the Pittsburgh City Ordinance. The *Amici's* brief will assist the Court in reviewing the issues raised by the Petition, because the *Amici* have broader familiarity than either of the parties with tax incentive financing (TIF) and other widespread forms of economic development programs utilized by state and local governments everywhere in the United States.

The City Ordinance upheld below broadly imposes collective bargaining obligations on private employers, in direct contravention of the NLRA. As a result of the Third Circuit's decision, private businesses nationwide will be in jeopardy of losing their rights to freedom of contract previously protected by federal labor law. By expanding this Court's "market participant" doctrine beyond the narrow confines of the construction industry and into the inherently regulatory practice of tax increment financing, the Third Circuit's decision threatens interference with the protected rights of countless private employers and their employees.

SUMMARY OF ARGUMENT

The Third Circuit's ruling that governmental economic development programs such as tax increment financing (TIF) are exempt from labor law preemption significantly undermines the Congressional policies underlying the National Labor Relations Act, by allowing state and local governments to impose regulatory labor policies on large numbers of private employers and employees under the guise of maintaining "proprietary" interests.

This Court's "market participant" exemption from labor law preemption has never been applied so broadly as in the present case. The Third Circuit appears not to have fully appreciated the pervasiveness and scope of the many business development programs potentially impacted by its decision upholding the Pittsburgh ordinance. The form of development program at issue in this case, tax increment financing (TIF), is utilized throughout the country and impacts many billions of dollars of economic development. By characterizing TIFs and similar business development programs as exempt from NLRA preemption, the Third Circuit has in effect removed large numbers of private employers and their employees from the protections of the Act, in a manner never intended by Congress.

Among the most important rights of employers and their employees under the NLRA, long recognized by this Court, are the right to bargain collectively only with those unions selected as the majority representative of the employees, and the right to bargain in good faith without reaching an agreement imposed by any outside agency. The ordinance at issue in the present case plainly abrogates those rights in a manner fundamentally at odds with federal labor law.

The Fifth Circuit, the Ninth Circuit, and this Court have all held that the market participation exemption is limited to circumstances in which a government entity is acting in the same manner as a private employer. In the circumstances of the present case, however, no private developer outside the construction industry would ever be permitted to impose a union agreement requirement on another private employer. By expanding the holding of this Court's *Boston Harbor* decision beyond the narrow circumstances of the construction industry, the Third Circuit has ignored the previous holdings of this Court and the language and history of Sections 8(d), (e) and (f) of the NLRA.

The Third Circuit has misapplied the limited *Boston Harbor* exemption from labor law preemption and has failed to apply the "comparable private action" test developed in the Fifth and Ninth Circuits. As a result, the Third Circuit's decision threatens massive disruption of the careful balance of interests established by federal labor law. The Petition should be granted so that this Court can clarify the scope of the market participation exemption from labor law preemption and return this Court's doctrine to its previous narrow boundaries.

REASONS FOR GRANTING THE PETITION

I. THE PETITION PRESENTS AN ISSUE OF GREAT IMPORTANCE TO THE BUSINESS COMMUNITY: THE UNPRECEDENTED AND IMPROPER EXPANSION OF THIS COURT'S NARROW "MARKET PARTICIPANT" EXEMPTION FROM LABOR LAW PREEMPTION.

A. The Third Circuit Failed To Appreciate The Broad Impact of Government-Sponsored Economic Development Programs On Private Sector Employers and Employees.

Many billions of dollars are spent annually by both state and local governments throughout the country on business development incentive programs. *See* Lockie, *Economic Development Incentive Wars*, www.cba.uni.edu9economics (2004); *see also* Corporation for Enterprise Development, *Ten Questions on Development Incentives*, www.cfed.org (2002). The past quarter century in particular has witnessed explosive growth in such economic development incentive programs, so that "today, every state in the union and nearly every large city in the country have established an economic development department or a public-private partnership with the mission of economic development." Lockie, *supra*, at 24.

Government-sponsored economic development programs take many forms:

- One-time deals negotiated with a specific firm, such as a property tax exemption;

- Grants and loans provided under programs that receive annual state appropriations, where a firm must apply for funding;
- Programs with established parameters and limits but with some degree of local government discretion allowed, including property tax abatements and tax increment financing districts;
- Tax incentives that function as entitlements, such as enterprise tax zones;
- Features of the tax code that favor certain forms of businesses, such as exemptions for inventories, fuel or utilities.

See Fisher and Peters, *Competition Among American States and Cities* (Upjohn Institute 1997).

As can be seen from the above list, most of these business development financing schemes, like Pittsburgh's TIF ordinance, involve the application of, or exemption from, **tax laws**, an inherently regulatory function of government. *See Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 592-3 (1997) ("[A]ssessment and computation of taxes is a primeval governmental activity"); *see also Associated Builders and Contractors of Rhode Island, Inc. v. City of Providence*, 108 F. Supp. 2d 73 (D. R.I. 200) (finding preemption of TIF-financed union requirements).

Another common feature of business development financing, as practiced in Pittsburgh and elsewhere, is that governments use such programs to encourage **private** economic development, without the government itself taking ownership of the projects at issue. Thus, in none of the program examples listed above does the government typically become the "proprietor" of the business or project being developed. Rather, the government is seeking through tax incentive programs to attract more *private* (tax paying)

businesses to locate within the local government's jurisdiction.

When properly implemented, such business development programs benefit both state and local governments and the private sector as well, and should be encouraged. At the same time, governmental economic development programs have tempted increasing numbers of state and local governments to use their financial resources in coercive ways, and to engage in unprecedented regulatory intrusion into the private business world. Such intrusion is inconsistent with rights previously protected under federal labor law for both employers and employees in the private sector, and is reflected not only in the present case, but in ongoing litigation in other circuits. *See Chamber of Commerce v. Lockyer*, 364 F. 3d 1154 (9th Cir. 2004) (petition for rehearing en banc pending) (rejecting state attempt to prohibit state contractors from exercising rights protected by NLRA); *Metropolitan Milwaukee Assn of Commerce v. Milwaukee County*, Case No. 01-C-0149 (E.D. WI 2005) (appeal pending) (forcing private nursing home operators to waive NLRA election procedures and other protected rights); *Northern IL Chapter Builders v. Lavin*, Case No. 04-C-50357 (N.D. IL March 24, 2005) (forcing private renewable fuel plant owners receiving state assistance to adopt union agreements)

The Third Circuit's characterization of government-sponsored business development programs as "proprietary" or "market participation" for purposes of exempting such governmental conduct from labor law preemption, deprives those terms of their true meaning. The Third Circuit's decision also gives no sense of comprehending the pervasiveness of the governmental conduct being exempted by this decision from the protections of federal labor law. The results of exempting so much government assisted activity from federal labor law preemption will truly be

staggering; indeed, a substantial percentage of the entire private sector business community will be adversely affected by this decision. No justification exists for granting state and local governments *carte blanche* to use their economic development programs as weapons undermining the federally-protected rights of so many private employers and their employees under the NLRA.

B. The Third Circuit Grossly Erred In Its Analysis Of Federal Labor Law Preemption.

The National Labor Relations Act protects the right of employers to enter into agreements with labor unions only on a voluntary basis, as a result of good faith bargaining in a manner regulated by the National Labor Relations Board. Neither the NLRB nor any private employer outside the construction industry is permitted to force another private employer to enter into any involuntary agreement with a union. *See H.K. Porter, Inc. v. NLRB*, 397 U.S. 99 (1970)(citing Section 8(d) of the Act). *See also Connell Construction Co. v. Plumbers and Pipefitters Local 100*, 421 U.S. 616 (1975) (explaining Section 8(e)'s prohibition against so-called "hot cargo" agreements outside the construction industry). Employees likewise have the right not to be forced to accept representation by unions who have not achieved majority support or to be subject to imposition of collective bargaining agreements in the absence of majority union representation, under Sections 7, 8 and 9 of the NLRA. *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 307 (1974).

In the present case, Pittsburgh's ordinance requires that private, non-construction industry employers operating hotels, restaurants, bars, clubs, cafeterias, or other food and beverage operations sign collective bargaining agreements

with a union, or other agreements relating to issues relating to union recognition and bargaining, as a condition of receiving any form of financial assistance (including tax incentives) from the City. Neither the NLRB nor any private entity would be entitled to impose such a requirement on employers or employees under the NLRA.

Under both *Garmon* preemption (*San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244-45 (1959)) and *Machinists* preemption (*Lodge 76, International Assn of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976)), the Third Circuit should have found that the Pittsburgh ordinance is preempted by the NLRA. The ordinance plainly regulates activity that the NLRA protects, prohibits, or arguably protects or prohibits within the meaning of *Garmon*, and further regulates conduct that Congress intended to be left unregulated under the holding of *Machinists*. *See also Wisconsin Dept of Indus., Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 286 (1986); and *Golden State Transit v. City of Los Angeles*, 475 U.S. 608 (1986) ("A local government, as well as the National Labor Relations Board, lacks the authority to "introduce some standards of properly 'balanced' bargaining power ... or to define what economic sanctions might be permitted negotiating parties in an ideal or balanced state of collective bargaining.")

In *Bldg. & Const. Trades Council v. Associated Builders and Contractors of Mass./R,.I., Inc.*, 507 U.S. 218, 230 (1993) ("*Boston Harbor*"), this Court recognized a narrow exemption from labor law preemption in the unusual circumstance where a state authority engaged in conduct that any private entity could also engage in, specifically in the construction industry. When the Massachusetts Water Resource Authority entered into a project labor agreement for a large construction project, the Court found that this was a type of agreement common to the construction industry and

was expressly authorized for private construction employers by Sections 8(e) and 8(f) of the NLRA. These sections of the Act permit "employers in the construction industry" and *only* such employers, to require subcontractors to enter into union agreements as a condition of performing work on a particular construction project. Under these unique circumstances, the Court upheld the project agreement "when the MWRA, acting in the role of purchaser of construction services, acts just like a private contractor would act, and conditions its purchasing upon the very sort of labor agreement that Congress explicitly authorized and expected frequently to find...." 507 U.S. at 233.

By expanding the market participant doctrine beyond the construction project circumstances present in *Boston Harbor*, the Third Circuit ignored the language and history of Sections 8(e) and (f) of the NLRA. The NLRA does not permit anyone other than an "employer in the construction industry" to enter into union-only subcontracting arrangements with labor unions. Private owner-developers do not typically enter into such arrangements; and they are *prohibited* from doing so under the NLRA unless they are in fact employers in the construction industry.

The Supreme Court has held that Congress intended the construction industry proviso of Section 8(e) to preserve only "the pattern of collective bargaining" that existed in the construction industry when Section 8(e) was enacted in 1959. *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 657 (1982); *Connell Construction Co., Inc. v. Plumbers and Steamfitters, Local 100*, 421 U.S. 616, 627-33 (1975). *See* 105 Cong.Rec. 16414 (1959)(remarks of Sen. Kennedy), *reprinted in*, 2 Leg.Hist. at 1432. Recognizing Congress' intent, the Supreme Court held that questions concerning the scope of the proviso are completely controlled by "Congress'

perceptions regarding the [pre-1959] status quo in the construction industry."

The legislative history of Section 8(e) further demonstrates that Congress intended the phrase "employer in the construction industry" to refer only to construction contractors. Senator Kennedy and other prominent members of Congress used the phrases "employer in the construction industry" and "contractor in the construction industry" interchangeably. 105 Cong.Rec. 16415 (remarks of Sen. Kennedy) 2 Leg.His. at 1433; 105 Cong.Rec. at 16635 (remarks of Rep. Thompson), *reprinted in* 2 Leg.Hist. at 1720. Congressional debates concerning the propriety of "hot cargo" agreements in the construction industry focused exclusively on agreements between unions and "contractors," "prime contractors" or "general contractors." *Id.* (noting Congress' intent to preserve the right of "unions and prime contractors in construction industry to enter into [hot cargo] agreements"); *id.* at 8359 (remarks of Sen. Goldwater), *reprinted in* 2 Leg.Hist. at 1829-30 ("a building trades union may enter into a contract with a contractor – building contractor – whereby he agrees that he will not let work to any subcontractor who is nonunion").[2]

The legislative history of Section 8(f) even more clearly demonstrates that the "pattern of collective bargaining" that Congress perceived (and intended to preserve) was a pattern of agreements between unions and construction contractors, not owner-developers. Congress perceived the employers involved in this "pattern of collective bargaining" to include only those who: (1) submit

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[2] *See also* 105 Cong.Rec. App. 8141 (remarks of Sen. McNamara), *reprinted in*, 2 Leg.Hist. at 1815; *id.* at 8222 (remarks of Rep. Thompson), *reprinted in*, 2 Leg.Hist. at 1816.

bids or proposals to construct improvements to real property; (2) enter into prime construction contracts (with owner-developers) or construction subcontracts (with prime contractors); and (3) perform work requiring the employment of "skilled craftsmen." Private owner-developers rarely, if ever, engage in these activities.

In the present case, the Pittsburgh ordinance ranges far beyond the construction industry in its collective bargaining mandate. The ordinance expressly applies to employers operating hotels, restaurants, bars, clubs, cafeterias, or other food and beverage operations. It is undeniable that such employers are outside the narrowly permitted scope of Sections 8(e) and 8(f).

Had the Third Circuit applied the two-part preemption test derived from *Boston Harbor* that was set forth in *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F. 3d 686, 693 (5th Cir. 1999), and in *Chamber of Commerce v. Lockyer*, 364 F. 3d. 1154 (9th Cir. 2003), then the Pittsburgh ordinance would plainly have been found to be preempted.[3]

Here, the Pittsburgh ordinance does not deal at all with the "efficient procurement of needed goods and services" described in *Cardinal Towing*, but is instead a tax measure. The ordinance also fails to satisfy the exemption standard "by comparison with the typical behavior of private

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[3] In *Cardinal Towing*, the Fifth Circuit adopted the following preemption standard: "First, does the challenged action essentially reflect the entity's own interest in the efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances? Second, does the narrow scope of the challenged action defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem?"

parties in similar circumstances." As noted above, no private party would be permitted under the NLRA to force a non-construction employer to recognize and/or enter into a collective bargaining agreement with any union. Finally, the Pittsburgh ordinance is not at all "narrow in its scope" under the *Cardinal Towing* test. Rather, the ordinance broadly imposes union requirements on non-construction industry employers and employees for reasons having nothing to do with any specific proprietary interest or specific project of the City.

Pittsburgh's ordinance must therefore be preempted because it conflicts with the Board's established policies for effectuating free and fair choice by employees with respect to union representation, and with Congress' purpose in making a Board forum available to employees, employers, and unions who are caught up in resolving questions concerning representation. Contrary to the finding of the Court of Appeals in this case, because the Pittsburgh ordinance is directed at employers hired to staff the operations of hotels, motels, restaurants, clubs, cafeterias and food and beverage operations – as opposed to construction industry employees – there is no exception from preemption doctrine that would even arguably allow the City of Pittsburgh to intrude on federal labor policy. The ordinance also should have been found preempted, as further noted above, because no private developer is able to manipulate the tax system to support its cash flow, as the City has done, and the interests of the City in developing its tax base through the TIF program are fundamentally regulatory in nature.

It is vital that this Court grant the Petition so that the numerous errors of the Third Circuit with regard to federal labor law preemption can be corrected. This is an issue of great public importance, and the failure to reverse the Third Circuit's decision will cause great harm to the federal labor law balance of interests nationally.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted and the judgment below should be reversed.

Respectfully submitted,

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